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REVIEW ON THE GROUND OF NEW EVIDENCE:— A CRITICAL NOTE.

[*Nandalall Mullick* v *Panchanan Mukerjee* [1].]

Two questions arising under the law relating to *review* were considered in the above case *viz.*, (i) the nature of the evidence requisite to justify a Court in granting a review on the ground of its discovery and (ii) the powers of an Appellate Court to interfere with an order granting a review on this ground. On the first, the learned Judges adopt the rule laid down in certain recent cases in England, as governing motions for 'new trial,' *viz*, that the *new* evidence relied on must be such as, if produced at the trial, would have been *conclusive* in favour of the applicant. As to the second, they hold that 'strict proof' in O. 47, R (2) (*b*) merely means 'legal evidence' and that if the Court below had before it legal evidence as to the circumstances of the 'discovery' a court of appeal ought not to interfere with its discretion in granting a review or consider the 'sufficiency' of the proof as to the applicant's diligence. We cannot help feeling that the view as above stated unduly narrows the scope of the beneficent provisions of the statute on both the points mentioned. The respect due to the considered opinion of the learned Judges and the practical importance of the subject necessitate a careful investigation of the principles on which the rules of the Indian Procedure Code on this matter rest and the applicability thereto of the analogy and restrictions of the law relating to 'New trials' in England.

It may be useful to recall that the law and practice as to 're-hearing—using it as a convenient generic term—in the Courts of Record in England, has grown up under the constant influence of *two* important factors, one, the divergent jurisdictions of the Common Law Courts and the Chancery and the other, the division of functions between Judge and jury. The practice of 'rehearing' in chancery seems to have owed its origin to the circumstance that there was no appeal from the Lord Chancellor to any higher

1. (1917) I. L. R. 45 C. 60.

tribunal, so that any injustice arising out of his decisions could be remedied only by himself correcting his own or his predecessor's orders. The matter was regulated by General orders and as early as Lord Bacon's time it was settled that a decree *once enrolled* could be reversed or altered only upon a bill of review and that no bill of review shall be admitted 'except it contain either error in law appearing in the body of the decree without further examination of matters of fact or some new matter which hath risen in time after the decree and not any new proof which might have been used when the decree was made; nevertheless upon new proof that is come to light after the decree made and could not possibly have been used at the time when the decree passed, a bill of review may be grounded by the special license of the court and not otherwise.' *Prior to enrolment* of the decree or order, any error therein might have been rectified on a mere petition of re-hearing. (See per. Cozens. Hardy L. J. in *Charles Bright and Co. Ltd.* v. *Sellar* [1] per Lord Hardwicke in *Norris* v. *Le Neve* [2]). The like power came, in course of time, to be exercised by the Lord Chancellor's deputies as well, *i. e* by the Master of the Rolls and the Vice Chancellor. There was however nothing analogous to this in the Common Law Courts (per Thesiger, L. J., in *In re St. Nazaire Company* [3]) and after the fusion of practice effected by the Judicature Acts it would appear that no division of the High Court has power to review or re-hear a case after judgment had been passed and entered (*ibid.* see also per Romer, J., in *Ainsworth* v. *Wilding* [4]). The jurisdiction to review being substantially in the nature of an appellate power, such part of that old jurisdiction as at all remains now belongs to the Court of Appeal, subject however to the possible right of a suitor to get similar relief in certain circumstances, by an independent action corresponding to the old bill of review (*See Boswell* v. *Coaks* (*H. L.*) [5] *Birch* v. *Birch* [6].) The Common Law Procedure was dominated by the finality attaching to the verdict of a jury. The Court could not ordinarily disturb it, the aggrieved party could only move for a new trial; (Compare *Davies* v. *Felix* [7] with *Potter* v. *Cotton* [8]) and it required the intervention of the Legislature to empower the Court of Appeal in certain circumstances to enter judgment for one or other of

1. (1904) 1. K. B. 6.
2. (1743) 3 Atk. 26.
3. (1879) L. R. 12 Ch. Dat. p. 101.
4. L. R. (1896) 1 Ch. 672.
5. (1894) 6 R. 167,
6. L. R. (1902) P. 130,
7. (1878) L. R. 4 Ex. D. 32.
8. (1879) L. R. 5 Ex. D. 137,

the parties without ordering a new trial. A long course of practice strictly limited the grounds on which a new trial could be granted and the procedure relating to motions for the purpose has varied from time to time (cf. per Fletcher Moulton, L. J. in *Dean* v. *Brown* [1] *Penn* v. *Bibby* [2] *In re May* [3] *Heckscher* v. *Crosley* [4] *Allcock* v. *Hall* [5]). Motions for a new trial are now regarded as pertaining to the appellate jurisdiction of the Court and governed to a certain extent by the principles relating to appeals (See O. 39 of the Supreme Court Rules), subject however to this important difference that where the appeal is from a Judge (without a jury) the Court of Appeal 're-hears' the case, even in so far as it involves questions of *fact*, see *Coghlan* v. *Cumberland* [6]. If after a case has been decided by the trial Court a party wants to avail himself of the benefit of *new* evidence, he may, in cases in which the question of fact is open for the decision of the Appellate Court, have it adduced in the Appeal (O. 58 r. 4) but in other cases, it will only afford him ground for a motion for new trial. In dealing with such motions, language of different degrees of strictness has been employed from time to time in the reported cases. In *Anderson* v. *Titmas* [7] it was said that a new trial would not be granted on the ground of the discovery of fresh evidence unless there is a reasonable probability that it would have altered the verdict. Cleasby, B. said that the fresh evidence should be conclusive. Twenty years later, in *Young* v. *Kershaw* [8] one learned Judge of the Court of Appeal (Smith, L. J.) required that the new evidence must be such as, if it had been adduced at the trial, 'would have been conclusive, so that the verdict must have been found otherwise.' Another Lord Justice (Williams, L. J.) said that the new evidence must be such 'that without it the verdict must be taken to have been based on mistake, surprise or fraud.' The third Lord Justice (Collins, L. J.) described the test with the qualification that the evidence must be 'practically conclusive', so as to render it 'probable almost beyond doubt' that if it be adduced, the verdict would be different. Then came *Brown* v. *Dean* [9] in which Lord Loreburn, L. C. laid it down that the new evidence 'must at least be such

1. L. R. (1909) 2 K. B. 573
2. (1866) L. R 2 Ch. App. 127.
3. (1885) L. R. 28 Ch. D. 516.
4. (1891) 1 Q. B. 224.
5. L. R. (1891) Q. B. 444.
6. L. R. (1898) 1 Ch. 704.
7. (1877) 36 L. T. 711.
8. (1899) 81 L. T. 531.
9. L. R. (1910) A. C. 373.

as is presumably to be believed and, if believed, would be conclusive.' But Lord Shaw, it may be noted, would not accept the test as thus stated; his Lordship only thought that the new evidence should be 'material' and 'relevant'. It is scarcely necessary to point out how considerable is the difference between the two standards. When that case was before the Court of Appeal Lord Alverstone, C. J. said that 'if the matter were *res integra* there would be a good deal to be said for giving a County Court Judge, at any rate in a case tried before himself alone, a wider discretion as to ordering a new trial than exists in the Supreme Court.' In *Warham* v. *Selfridge* [1] the point was stated substantially in the terms employed by Williams, L. J. in *Young* v. *Kershaw* [2] *viz.*, that the new evidence must be of such a character 'as to justify one in saying that the verdict could not in the interest of justice be relied on because it was based on mistake, surprise or fraud.'

Turning now to the former practice in Chancery the test suggested in *Bennet* v. *Lee* [3] was, whether the new evidence was 'relevant to the matters in question or so material as to induce the court to put the parties to the expense of a new hearing.' In *Thomas* v. *Rawlings* [4] the Master of the Rolls dealt with the application on the footing whether 'if the matter were brought before me on the former evidence in the cause, coupled with what is now adduced and with no other or further evidence, it would have induced me to make a different decree to that which I then pronounced.' *Hungate* v. *Gascoyne* [5] deserves to be particularly noticed The Vice-Chancellor had granted the plaintiff leave to file a bill of review on the ground that the new evidence was 'material to the issue,' but Cottenham, L. C. discharged that order holding that the question was 'not merely whether the evidence was material but whether looking at the case made on the other side and the whole mass of evidence adduced on the former hearing, what was now brought forward would have been likely to have altered the judgment which the Court then came to.' In *Hosking* v. *Terry* [6] the Judicial Committee described the new evidence required as of 'such a character that if it had been brought forward in the suit it might probably have

1. (1914) 30 T. L. R. 344.
2. (1899) 81 L. T. 531.
3. (1742) 2 Atk. 529.
4. (1864) 34 Beav. 50.
5. (1846) 2 Ph 25.
6 (1862) 15 Moo. P. C. 493.

altered the judgment.' And more recently, in *In re Appa Rao* [1] the Board described a 'relevant case of *res noviter*' as 'new matter which would, if it had been submitted to the consideration of this Board, possibly have led to a different decision from that which was formerly arrived at.' (See also, *Falcke* v. *Scottish Imp. Insurance Co.* [2] and Daniell's Chancery Practice. 7 Edn p. 1286.) To the same effect was the observation of the House of Lords in *Boswell* v. *Coaks* [3] where Lord Selborne, stating the principles applicable to the old bill of review, said that two things must be shown, 'first, that something has been newly discovered * * * * * and then, that that something is material.'

The decision in *Turnbull & Co.* v. *Duval* [4], referred to by Mookerjee, J. in the case under notice, gives us little guidance on the present question except for the general statement of Lord Lindley that a new trial ought not to be 'lightly granted.' In the particular case, their Lordships decided against the motion for new trial on the ground that the document whose discovery was relied on could have been had even before, if proper steps had been taken; but they went on also to express their opinion on the possible effect of the new document, observing that 'it might perhaps have been useful' at the trial for cross-examination but 'it ought not to alter the final result.'

Reference may conveniently be made here to certain observations of Vaughan Williams, L. J. in *Birch* v. *Birch* [5], where the question arose in connection with a petition to stay the hearing of a fresh action instituted to obtain a declaration that a prior judgment had been obtained by fraud. The House of Lords in *Boswell* v. *Coaks* [3], had intimated that such, an application should be dealt with in accordance with the principles applicable to the old bill of review. After stating that the new facts relied on in support of the fresh action should be such as to 'raise a reasonable probability of the action succeeding,' the learned Lord Justice proceeds to observe. 'But I do not think that it can be laid down as a hard and fast rule that the evidence ...must be of such a character that it would be evidence in the action itself.............Suppose the case of a judgment based on the validity of a document vouched by one witness alone : suppose

1. (1886) L. R. 11 A. C. 660 S. C I. L. R. 10 M. 73.
2. 57 L. T. 39.
3. (1894) 6 R. 167.
4. L. R. (1902) A C. 429.
5. L. R. (1902) P. 130.

that that witness had sent to the police authorities a confession that the document was forged by him; suppose that that witness had written to say that he desired to return from abroad to give himself up for trial for the offence of forgery; suppose that he had actually taken ship for the purpose of coming to England and surrendering for his trial * * * * * * none of the matters included in this hypothetical case could be used as evidence on the trial of the action. But I do not think that it would be possible to describe the action as frivolous or vexatious* * * * * * I should think that in such a case the action ought to go on * * * in each case it is a question of degree.'

It may be mentioned in passing that even in the Chancery (before the Judicature Acts) there was a procedure by way of motion for new trial, in cases where the Court of Chancery had sent up issues for trial (at law) by a Jury. It is worth noting that even in such cases, the rules in equity were 'less strigent' than at law. In the words of Lord Romilly in *Swinfen* v. *Swinfen* [1], the course in Courts of equity was 'not to consider merely whether there was evidence which would support the finding of the Jury, and in that case to refuse a new trial, but...... to consider whether, having regard to the entire subject-matter and to the whole of the evidence given at and before the trial and what has since become known, the Court is satisfied that full and complete justice has been done between the parties and that no further investigation is necessary for the purpose of attaining that end.'

In *Shields* v. *Boucher* [2] upon the trial of an issue directed by the Chancery, the evidence of a material witness had been discredited as being uncorroborated and in other respects also unsatisfactory. There was a motion for new trial before Knight-Bruce, V. C. and in support thereof certain affidavits were filed showing that the evidence of the witness might be substantially corroborated. The Vice-Chancellor in granting the motion put to himself the question 'Is it not possible, fairly possible, that confirmatory testimony * * * * * might rationally have had weight with the Jury, may well deserve consideration.' This is surely very different from saying that the new evidence must be conclusive or even practically conclusive. He also states that 'a learned

1. (1859) 27 Beav. 148.

2. (1846) 1 De. G. and Sm. 40.

Judge of the greatest experience in the courts of common law' was consulted by him as to 'whether, in his opinion, if an analogous question were to arise in one of those courts upon a motion or rule for a new trial in an action, a new trial would be granted on the affidavits' and the answer was in the affirmative While treating that opinion as deserving of his attention and consideration, the Vice-Chancellor adds 'neither that answer nor the general course or habit of dealing with such matters at common law binds me'.

A recent decision of the Court of Appeal in England (*Robinson* v. *Smith* [1]) illustrates the hardship, if not injustice, likely to result from a strict enforcemnt of the established Common Law rule as to the granting of new trials.

Out of the several ways in which, as above pointed out, the conditions requisite to warrant a re-hearing have been stated in England, it is difficult to see why Courts in India should be called upon to accept the most narrow and rigorous one laid down by Smith and Collins, L. JJ. in *Young* v. *Kershaw* [2], and by Lord Loreburn in *Brown* v. *Dean* [3]. The Statute Law governing us here only requires that the matter or evidence alleged to have been discovered should be 'new and important.' If anything the history of this provision, in Indian processual law, must lead us to the adoption of the more liberal rule that obtained in the chancery courts. Here, as there, the primary intention of granting a review was a re-consideration of the same subject by the same Judge except in special cases (*Maharajah Moheshur Sing* v. *The Bengal Government* [4]), and this has been expressly provided for in the Statute. The recognition, from the earliest days of British legislation in this country, of a power of review. not merely on certain specified grounds but also 'for any other good and sufficient reason' (Bengal Regulation XXVI of 1814. S. 4) shows that the Jurisdiction was meant to be wider than that recognised in England in recent times (See *Amir Hasan* v. *Ahmad Ali* [5]) and approximates the aim and scope of this Jurisdiction to those of the power exercised in this behalf by the Lord Chancellor in England. And from the early days, the condition requisite in this country for the grant of a review, was that the court should be satisfied that the review desired 'was necessary to correct an evident error or omission or was otherwise

1. L. R. (1915) 1 K. B. 711.
2. (1899) 81 L. T. 531.
3. L. R. (1910) A. C. 373.
4. (1859) 7 M. I. A. at p. 304.
5. (1886) I. L. R. 9 A. 36.

requisite for the ends of Justice.' In the case of inferior courts, the former practice here was that they could grant a review only with the permission of the appellate court, but since 1859, even this limitation has been abrogated and Act VIII of 1859 went the length of giving *finality* to their orders in the matter of granting or refusing a review. Where the review was applied for on the ground of the discovery of new evidence, the Regulations did not prescribe anything as to the *nature* of the new evidence nor even the Code of 1859. In one case (*Shumsheir* v. *Ramchandur* [1]), one of the Judges (Steer, J.) took occasion to define what he conceived to be the principles that should guide Judicial officers in exercising 'the very large discretion with which the law is thought to invest them' in the matter of granting reviews. In the course of his observations on the point, the learned Judge said 'If...the Judge finds that the new evidence tendered is not sufficient *per se* to show that the decision of the predecessor is wrong on the matter of fact, or that the new evidence, if thrown into the scale, would not create an overpowering balance of evidence' on the side of the applicant 'the Judge's proper course is to refuse the application' Nine years later (in *Sahabjan Bibee* v. *Sufdur Ali* [2]) Sir Richard Couch and Mr. Justice Ainslie expressly dissented from these remarks and pointed out that the law authorises the new evidence to be admitted if once the court is satisfied that it had not come to the knowledge of the parties before. When it is admitted, 'the Court is to consider the case with the new evidence in the same way as the case would have to be considered before. There is no more reason for an overpowering balance of evidence when the judgment in review comes to be given than there was on the first occasion' Next year (in *Heera Lall* v. *Ram Taruck* [3]) Mr. Justice Macpherson, dealing with a very belated application for review, remarked that 'the circumstances must be special * * * * and the evidence discovered must be of a clear and conclusive character'. The appplication was dismissed after a consideration of the probable effect of the new evidence and also on the ground of various suspicions attaching to the document relied on. It is not certain whether the learned Judge meant the above statement to be a general rule. In this state of things, the Indian Legislature, when enacting the Code of 1877 contented itself with qualifying the 'new matter or

1. (1865) 2 W. R. 174. 2. (1874) 22 W. R. 288.
3. (1875) 23 W. R. 323.

evidence' by the epithet 'important' and that is the form in which the rule has remained to this day. Why should the Courts go and add to it or import restrictions which the Legislature has not thought fit to enact? In the words of Fletcher Moulton, L. J, in his dissenting judgment in *Dean* v. *Brown* [1] 'the practice of the English Court, in this matter, does not represent principles of abstract justice which are equally binding on all tribunals' nor does it rest on 'the interpretation of a statutory jurisdiction given in like language.' Where the power is conferred and defined by statute, its 'scope and restrictions must be ascertained from the language of the section itself.'

The decision of the Privy Council in *Kessowji Issur* v. *G. I. P. Railway Co.* [2] has very little bearing upon the point under discussion. The question there turned on the power of an appellate court to admit fresh evidence *in appeal*. There had no doubt been an application for review in that case before the court of First Instance (Tyabji, J) which had been refused and in that connection their Lordships lay stress on the condition laid down in the code that the applicant for review should strictly prove the absence of negligence on his part. The Judicial Committee also draw attention to the difference between the admission of 'further evidence' *on appeal* and the letting in of newly discovered evidence in a proceeding by way of review, but no point arose there as to the *nature* of the evidence to be tendered in support of a review application.

Proceeding next to the question of the power of an appellate court to discharge an order of a subordinate Court granting a review on the ground of the discovery of new evidence, the practice in India under the early Regulations was, as already stated, for the subordinate Court to grant a review only on report to and the permission of the superior court. The Circular orders of the Sudder Court required that the judge should in the letter asking for permission state distinctly the grounds of his opinion and where there was a plea of, new matter or evidence discovered, 'the manner in which the new matter was discovered and the cause of the inability of the party to produce the evidence in proper time, with the proof of the fact, should be clearly detailed as well as the effect which the new matter or evidence would have in impeaching the propriety of the

1. L. R. (1909) 2 K. B. 573. 2. (1907) I. L. R. 31 B. 381.

judgment' (Macpherson's Procedure 1854 p. 540. citing Cir. Order, Cal. and West Cir. 27 Novr. 1835). In a case governed in some measure by these Regulations the Judicial Committee, on an appeal from the final decision passed on review, examined the sufficiency of the reason assigned for granting the review and holding against it set aside the order 'as granted without due regard to the Regulations' with the result that the original decision was restored without any examination of the merits. (*Moheshur Singh* v. *The Bengal Government.* [1]). When in 1859, subordinate courts were empowered to grant reviews on their own authority, without reference to the superior court, the Act went on to declare that the 'order, in either case, whether for rejecting the application or granting the review, shall be final.' And where the plea was one of *res noviter*, the Code made no specific provision as to proof of absence of negligence at the time of the trial. It accordingly became necessary (as many a reported decision in the Weekly Reporter Volumes would show) for the High Court to insist on such proof as being within the intendment of the law, and the Calcutta High Court held that though in consequence of the 'finality' given by the Act to the order of the subordinate court, the re-hearing could not be prevented by the Appellate Court, yet on an appeal against the decree passed at such re-hearing, the appellate court could restore the original decree if it thought that the review had been granted on insufficient grounds (See *Shumsheir* v. *Ram Chunder* [2]), or on an application made after the prescribed time without sufficient cause for the delay (*Gunga Narain Roy* v. *Gonomoonee* [3] approved by the Judicial Committee in *Lachman Singh* v. *Tirbani Buksh* [4]), or on a plea of new evidence without proof that such evidence could not have been adduced at the former trial. *Bhyrub Chunder* v. *Madhub Ram* [5]. Steer, J. in *Shumsheir* v. *Ram Chunder* [2] already cited, added "If there is no power, by way of appeal, to check the lower Courts from improperly granting applications for review and upsetting the decisions of their predecessors, then most assuredly the law should be altered to provide against such an arbitrary power." The Madras High Court in *Gurumurti* v. *Pappa Nayudu* [6] held that when a subordinate Court has

1. (1859) 7 M. I. A. 283.
2. (1865) 2 W. R. 174.
3. (1867) 8 W. R. 184.
4. (1874) 14 Beng. L. R. 373.
5. (1873) 20 W. R. 84 (F. B.)
6. (1863) 1 M. H. C. R. 164.

thought it right to grant a review, it 'cannot be objected upon appeal that the reasons for granting the review were improper or insufficient'. In *Sahebjan Bibee v. Sufdur Ali* [1] it was held that where a lower court, with materials before it, had come to the conclusion that the review applied for must be granted in the ends of justice, it was not for the appellate court to interfere with it though it 'might not agree in the view' taken by the lower court. The North West Provinces High Court, as early as 1872, restricted the finality to the 'grounds on which a review is held to be necessary' and claimed for the appellate court the power to decide 'whether just or reasonable cause has been shown for the admission *after time* of an application for review'. *George* v. *Hamilton* [2]. It may be pointed out that the decision of this question involves the exercise of *discretion* by the lower court and it will not therefore be right to say that on a question of 'discretion' the appellate court has no *power* to interfere. In *Reasut Hossein* v. *Hadje Abdollah* [3] the Privy Council had to deal with an order of the High Court (in its extra-ordinary jurisdiction) setting aside a subordinate court's order granting a review. Their Lordships in reversing the High Court's order pointed out, "Upon an appeal, where an appeal lies, it may be open to the Court of appeal to say that the judge ought not to have admitted a review; but that is a very different thing from ruling that he has acted wholly without jurisdiction. In the first case the appellate Court reverses the order because the judge has erred in the mode in which he has exercised a judicial discretion; in the latter case, it quashes the order because there was no discretion at all to be exercised.'

It was in this state of judicial authority that an express provision was inserted in Act X of 1877 declaring that an order granting a review may be objected to on certain specified grounds and that the objection may be made either at once 'by an appeal against the order' or later on, in any appeal against the final decree. The clause as drafted by the Select Committee provided that the order 'shall be final except where the review has been granted without jurisdiction, in which case an appeal shall lie' and it is only at the last moment that it assumed its present form. It was also in terms enacted that an

1. (1874) 22 W. R. 288. 2. (1872) 4 N. W. P. 74 (a).
3. (1876) I. L. R. 12 C. 13.

application on the ground of the discovery of new matter or evidence shall not be granted "without strict proof" that such matter or evidence was not within the applicant's knowledge or could not adduced by him when the decree was passed. It may be reasonably assumed that these provisions were framed in view of the pre-existing case law (above referred to.) According to the principle recognised by the Judicial Committee in the case last cited the appellate court should. with reference to the specified grounds, have the power to say that the Judge in the Court below 'had erred in the mode in which he has exercised his judicial discretion.' In connection with the grounds of objection recognised, the question of discretion may be said to arise with reference to (1) the proof of the circumstances of the discovery of the new evidence and (ii) the proof of sufficient cause for the delay, when the application is presented after the time prescribed (this provision has been embodied in S. 5 of the Limitation Act). The rules ordinarily regulating the interference by the appellate court in matters left to the discretion of the Court below are fairly well settled and we venture to doubt whether even according to them the powers of the appellate Court are quite so limited as stated by Mukerjee, J. in the case under notice. But it seems to us that in the present matter a different principle was intended to be adopted by the Legislature when it insisted on 'strict proof' as to the circumstances of the discovery and gave a specific right of appeal on the ground of contravention of that rule. The right of appeal appears to us, with all respect, to become almost shadowy if the appellate Court, as though it were dealing with the verdict of a jury or with a finding of fact (in second appeal), has only to see 'whether there was *legal evidence*' to support the view of the Court below and not consider the 'sufficiency' of the proof. The restrictive interpretation is based by Mukherjee, J. on the decision of Sir Lawrence Jenkins, C. J., and Woodroffe, J. in *Ahid Khondkar* v. *Mohendra Lal De* [1], where they held that 'strict proof' merely meant 'proof according to the formalities of the law' and had 'no reference to the sufficiency or the quantum of evidence.' Those learned Judges take the use of the word 'strict' as indicating that it was the 'form' of proof (and not its 'probative value') that was meant to be prescribed. With all respect, it seems to us that this

1. (1915) I L. R. 42 C. 880.

will prove too much; for on that construction even the Court granting the review (and not merely the Appellate Court) will only have to see to the 'form' of the proof and not to its 'sufficiency,' the expression 'strict proof' being used in describing what the court has to insist on before granting a review. On the other hand it would be alike appropriate and more consistent with the reason of the thing, to understand those words as prescribing the 'standard' of proof required and removing the question out of the ordinary category of 'discretionary' matters. So far as we can trace, the expression 'strict proof' seems to have been employed in this connection by Sir Barnes Peacock in *Dwarkanath* v. *Kishenlall* [1], where after pointing out that the petition for review in that case did not even allege in terms that the new documents relied on were not formely known to the petitioner, the Chief Justice went on to add, "Even if the fact had been stated, I should not have granted the application without strict proof that the new matter was discovered since the decree was passed." There is nothing in the context to suggest that the words were meant to refer to the 'form' of proof rather than to its probative value. Some observations in *Nundar Chand Bhooya* v. *Reedoy Mundal* [2], may seem to lend colour to the theory of formal proof; for there the court laid down the rule that in granting a review in such a case, the Judge 'must first satisfy himself on legal evidence that the applicant has brought himself within the section, in other words, must insist on the fact of the applicant's ignorance or inability being strictly proved.' But this we think can not be the proper interpretation of those remarks in view of the decision in *Nuffurchund* v. *A. D. Sandes* [3], which the case purports to follow. In the earlier Case, the learned judges first state that if there had been 'any evidence to this effect before the judge, we could not, here sitting in special appeal, have interfered with his discretion'— there was then no provision in the Code giving a right of appeal against the order granting the review. They then proceed to say, "Even had there been some evidence before the judge upon which he could have legally come to the conclusion favourable to the petitioner still, * * * * to use the words of the Chief Justice reported in Marshall 554, he ought not to have granted the application without strict proof that the new matter was discovered since the

1. (1863) Marshall p. 553. 2. (1872) 17 W. R, 458.
3. (1868) 10 W. R. 132.

decree was passed.' This makes it clear that the learned judges understood Sir Barnes Peacock's expression to refer to the 'standard' of proof and not to its mere form and this also seems to be the spirit of the observations of the Judicial Committee in *Kessowji* v. *G. I. P. Ry. Co.* [1] where, referring to this provision of the Code, their Lordships say it exacts very strict conditions so as to prevent litigants lying on their oars when they ought to be looking for evidence.

SUMMARY OF ENGLISH CASES.

Rondeau Le. Grand and Company *v.* **Marks.** 1918 1 K. B. 75 (C. A.)

Husband and wife—Agreement that all wearing apparel provided by the husband to the wife should belong to the husband subject to the right of the wife to wear during his pleasure—Validity of—Right of Judgment creditor of the wife against the wearing apparel.

When a husband and wife entered into an arrangement by which all dresses and wearing apparel were to be purchased by the husband in his name and on his credit and that he was entitled to dispose of them as and when he pleased and the wife was only entitled to wear them during his pleasure such an agreement is not contrary to public policy or void for want of consideration and it is a valid agreement. A judgment-creditor of the wife is not entitled to proceed against such wearing apparel for the satisfaction of his judgment.

The Common Law obligation of the husband to provide clothes to his wife is discharged by his giving or lending the clothes to her. The presumption that he intends to give them to her may be rebutted by such an agreement as mentioned above.

Clements *v.* **The County of Devon Insurance Committee :** 1918 1 K. B. 94 C. A.

Arbitration—Agreement of, between panel Doctor and Insurance Committee—Questions arising under agreement—Reference to Insurance Commissioners—Submission to Arbitration—Stay of action—National Health Insurance Regulations 1913, Reg. 51—Arbitration Act, 1889, Ss. 4 and 27.

1. (1907) I. L. R. 31 B. 381.

Where a medical practitioner on the panel and the Insurance Committee of a county entered into an agreement by which any dispute or question arising between the Doctor and the committee relating to the construction of the agreement and the rights and liabilities of either should be referred to the commissioners and the commissioners if they so thought fit were empowered to authorise two or more of the commissioners to hear and determine such question, and a dispute arose under the agreement and the practitioner brought an action against the committee in respect thereof and the committee applied for stay of the action under S. 4 of the Arbitration Act, *held,* (Bankes, L. J. doubting) that there was a "submission" to arbitration within S. 27 of the Arbitration Act and the court has power to stay the action in its discretion.

Johnson *v.* Sargant and Sons, 1918 1 K. B. 101.

Statutory order—Date when it comes into operation—Order of the food controller under the Defence of the Realm Regulations.

While a statute takes effect on the earliest moment of the day on which it is passed or on which it is declared to come into operation, an order passed under statute does not come into operation before it is known.

An order by the food controller inder the Defence of the Realm Regulations was dated the 16th of May 1917 but was not known to the parties or the public till the 17th of May, *held* that the order came into force only on the 17th when it was known.

Gonsky *v.* Durrell, 1918 1 K. B. 104.

Distress—Seizure of privileged goods—Value of other privileged goods after distraint—County Courts Acts, 1888 S. 147—Burden of proof—Common Law protection.

S. 147 of the County Courts Act provides "every bailiff or officer executing any process of execution issuing out of the court against the goods and chattels of any person may by virtue thereof seize and take any of the goods and chattels of such person (excepting the wearing apparel and bedding of such person or his family and the tools and implements of his trade to the value of £5 which shall to that extent be protected from such seizure.")

The plaintiff who sues the defendant for damages for wrongful distress under the above section and S. 4 of the Law of Distress Amendment Act must show that the value of the wearing apparel bedding and the implements of trade left upon the premises after the distress was less than £5 in value.

In an action framed solely upon the statute it is not open to the plaintiff to set up that the distress was bad at Common Law. In an action at Common Law the burden of proving the value of the goods left would be upon the defendant.

Clake Bros. *v.* **Knowles** (1918) 1 K. B. 128.

Jurisdiction—County Court—Action brought in a District where no part of the cause of action arose—Absence of jurisdiction—Step taken by defendant—Waiver—Prohibition—Contract by correspondence—Whether part of the cause of action arises where the letter of offer is posted.

Where a contract is effected by correspondence the posting of the offer does not constitute part of the cause of action. On the other hand the making of an offer is part of the cause of action and an offer is made where it is received.

A demand by the defendant for particulars of the claim in order to enable him to ascertain in order whether any part of the cause of action arose within the District in which the action is brought and the giving of an address for service do not amount to a waiver of the defect of local jurisdiction of the County Court over the cause of action.

Per Lush, J., The objection that no part of the cause of action arose in the District in which the action is brought is one of procedure rather than of jurisdiction. The case is not one of total absence of jurisdiction.

Trebeck v. **Croudace** : (1918) 1 K. B. 158 (C. A.).

False imprisonment—Arrest without warrant—Suspicion—Common Law and statute—Charge of being drink while in charge on highway, of taxicab—Honest and reasonable belief in charge—Mistake—Licensing Act, 1872 (35 and 36 Vic. C. 94) S. 12.

Not only has a constable no power at Common Law of arresting a person without warrant on suspicion of having committed a misdemeanour, but he has no power of arresting without warrant in any case of misdemeanour except when a breach of the peace had been committed in his presence or when there was reasonable

ground for supposing that a breach of the peace was about to be committed or renewed in his presence. In aid of the Common Law on this point and to supplement the powers of constables and others, the legislature has from time to time given authority for arrest without warrant in a number of cases of misdemeanour S. 12 of the Licensing Act, 1872 provides that every person who is drunk while in charge on any highway of any carriage may be apprehended and shall be liable to a penalty. Acting under the powers conferred by this section, the defendant a sergeant of police, took the plaintiff, a taxi-cab driver, into custody on a charge under the section. The plaintiff denied that he was drunk, and the Magistrate acquitted him. Thereupon the plaintiff brought an action claiming damages for false imprisonment. It was found as a fact that the defendant honestly believed at the time he arrested the plaintiff that the plaintiff was drunk. *Held* that the defendant was not liable in damages.

Rex *v.* Wakefield : (1918) 1 K. B. 162.

Criminal trial—Trial by Jury—Personation of juryman venire de novo.

Where after a trial and conviction in a criminal case, it was discovered that one of the jurors summoned to serve on the jury which tried the accused was personated by his bailiff who served on the jury though not qualified to do so : *Held* that there had been a mistrial and that a *venire de novo* should be granted.

Upjohn *v.* Hitchens. (1918) I. K. B. 171.

Landlord and tenant-covenant to insure against loss or damage by fire—Policy to be effected in specified companies—Practice of companies to except war risks in policy—Aircraft risks—Admissibility of evidence—Covenant—Construction.

By a lease of the year 1905 the lessor covenanted that he would insure the demised premises against loss or damage by fire in one of certain specified companies selected with the previous approval of the lessor. The premises were duly insured with a named company under a policy which excepted loss or damage arising from "invasion, foreign enemy, military power, etc." Till July 1915 the lessor had accepted the policy as sufficient, when in consequence of air raids by the enemy, he required the lessee to

insure the premises against loss or damage by fire occasioned by enemy aircraft, in pursuance of his covenant. On the failure of the lessee to remedy this alleged breach of covenant, the lessor sued to eject him *Held,* that the covenant was to effect such a policy as was the usual policy of the specified companies at the date of the lease or as might be usual from time to time during the pendency of the lease and that as it was clear on the evidence that the named companies had never insured against aircraft risks, (which were in fact specially excepted by their policies) there was no breach of covenant by the lessee.

Goldrei Foucard and Son v. Sinclair and Russian Chamber of Commerce: (1918) 1 K. B. 180 (C. A.)

Judgment—Merger of cause of action—Contract—Claim for damages for fraudulent misrepresentation against company and its agent—Alternative claim for rescission against company—Alternative claims—Judgment on one, not a bar to trial of the other.

A person who has been induced by misrepresentation to take shares in a company has two remedies open to him. He may bring an action against the company only for rescission of the contract and return of the money paid or he may bring an action in tort for fraudulent representations against both the company and its agent where the two have joined to commit the fraud. He may also take both these courses if he wish. In the former case, that is, an action for rescission and return of the money paid, the plaintiff need not prove fraud, but will succeed if he establish an innocent misrepresentation. He can in such an action obtain no relief against the agent of the company. If he do prove fraud in an action for rescission and return of the money he is in no better position than if he had proved innocent misrepresentation. In an action for damages arising from misrepresentation made jointly by the company and its agent he cannot succeed unless he prove that the misrepresentations were made fraudulently, and the measure of damages in such an action is not necessarily the amount of the money paid to the company. The two forms of action are founded on different causes of action and judgment entered in one is no bar to the trial of the other.

Marconi's Wireless Telegraph Company *v.* **Rex.** (1918) 1 K. B. 193 (C. A.)

Petition of right—Trial—Right to jury—Discretion of Judge—Question of construction of documents—Damages for breach of contract—Petitions of Right Act, 1860 (23 and 24 Vic. C. 34) *S.* 7.

In the case of a Petition of Right presented under the provisions of the Petitions of Right Act, 1860, the court has a discretion under S. 7 of the Act to order the petition to be tried without a jury, though in an action of the kind between subject and subject, either party would have been entitled to a jury.

Having regard to the fact that the case which related to a claim for damages for breach of contract, was a complicated one turning mostly on the correspondence the discretion of the judge was held to have been rightly exercised.

Wellaway *v.* **Courtier** (1918) I K. B. 200.

Trespass—Action for—Right to possession of crops on the land, if enough to support the action.

Plaintiff purchased a crop of growing turnips on a plot of land and one of the conditions of the sale was that the plaintiff should not remove more than half of them, the other half having to be consumed on the spot. The defendant was the purchaser of a crop of grass on land adjoining plaintiff's plot and defendant's sheep trespassed on plaintiff's plot and caused damage. In a suit for damages for trespass, *held* that the plaintiff had such an exclusive right to the possession of the turnip crop as to entitle him to bring trespass, notwithstanding that his right to dispose of the turnip crop when severed, was limited.

Edgelow *v.* **MacElwee** (1918) 1 K. B. 205.

Moneylender—Who is—Solicitor lending money—Money Lenders Act, 1900 (63 and 64 Vic. C. 51.

A man does not become a money-lender by reason of occasional loans to relations, friends or acquaintances whether interest be charged or not. Nor does a man become a money lender merely because he may upon one or several isolated occasions lend money to a stranger. There must be more than occasional and disconnected loans. There must be a business of

money lending. The word business imports the notion of system, repetition and continuity. Each case must depend on its own peculiar features. It is ever a question of degree.

A solicitor who while proposing to carry on this business as such, makes a practice of advancing money to clients and others, has to register himself under the Money Lender's Act, 1900, unless his primary object in lending the money is to maintain or increase his professional business and earn professional fees.

Belfast Ropework Co. v. Bushell: (1918) 1 K. B. 210.

Carrier—Common carrier and private carrier—Difference between option to refuse employment—Haulage contractor, if liable as insurer, for goods delivered for carriage.

To make a man a common carrier he must carry as a public employment; he must carry for all indifferently; he must hold himself as ready to carry for hire as a business and not as a casual occupation *pro hac vice.* All other carriers by land are private carriers. If a person, while inviting all and sundry to employ him, reserved to himself the right of accepting or rejecting their offers of goods for carriage whether his lorries were full or empty, being guided in his decision by the attractiveness or otherwise of the particular offer and not by his ability or inability to carry having regard to his other engagements, he is not a common carrier and is not liable for the loss of goods by fire during transit, without his own negligence.

Gascoigne v. Gascoigne: (1918) 1 K. B. 223.

Fraud of Creditors—Trust—Purchase of property by husband in wife's name—Intention to defeat Creditors—Subsequent dealings in wife's name—Presumption of gift.

In an action by a husband against his wife for a declaration that she was trustee for him of certain leasehold property it appeared that the plaintiff while living with the defendant took the lease of the lands in her name and built upon it with his own money and that he used his wife's name in the transaction with her knowledge and connivance because he was in debt and was desirous of protecting the property from his creditors. *Held,* that the husband could not set up his fraudulent design to rebut the presumption that the conveyance was intended as a gift to his wife and she was entitled to retain the property for her own use though she was a party to the fraud.

JOTTINGS AND CUTTINGS.

A Ready Retort :—Sir Albert Bosanqnet had a power which is characteristic of the really humorous speaker. He possessed and was able to maintain a funeral solemnity when saying the drollest things. This solemnity was in part due to his professional avocations Immersed as he was in black letter law, he seldom had a case which could be furthered by any excercise of his ready wit, Indeed his style of advocacy once excited the criticism of the late Sir Frank Lockwood. Mr, Justice Gainsford Bruce was a contemporary of Sir Albert. He, too, when at the bar, was regarded as a very dreary although very able exponent of the law. One day Sir Frank Lockwood said to Mr. Bosanquet, Q. C., " Really, Bozy, I think you are the very dullest man at the Bar!" To which the historic reply : " Have you considered the case against Gainsford Bruce"? But to hear Sir Albert after dinner was and I believe still is to rock your sides with laughter.—*The Canada Law Journal.*

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The following are some extracts from Mr. Balfour Browne's "Forty Years at the Bar" which may interest our readers.

Speaking of *Lord Llandaff (Henry Mathews, Q. C.) he says*: "Lord Llandaff was distinctly a man who was very much alive and who naturally demanded admiring attention. He was a man of very great ability, but I have seen many men with such less who made better advocates. Indeed, brilliance in a man is not the best ware to take to the market of a common jury. I feel inclined to offer Kingsley's advice to his daughter, slightly altered, to an aspiring barrister, "Be plain, good sir, and let who will be clever."

"Henry Mathews was too clever by half for an ordinary tribunal. A jury or even a stupid judge—and there are some—is suspicious of the qualities of genius in an advocate, and thinks with the common people that a man with such ability is taking them in; for the common people's idea of a lawyer is that he is intending to deceive and that there is more than meets the eye in the transposition of the letters in the word "lawyers" which in a different order make "slyware" ; and it is reported of a learned judge, so much is Bar eloquence a thing of the past, that he said of a clever counsel, " Sir, he insulted me with a peroration."

As a verdict-getter—and that is the real test for the client—Mathews was not very successful. To persuade a man you

must not seem to stoop to his intelligence. It was in this way that great, heavy, clumsy, slow Jack Holker (afterwards Lord Justice Holker) came to be a really successful man. He had the art of never seeming much cleverer than the people he was addressing. Besides, patience is an excellent quality in a counsel, and Henry Mathews was an impatient man. In the long inquiry I have mentioned he lost his little bit of temper several times, but notably with an engineer of experience, and turning to another Member of the Commission, I think, it was Mr. John Mellor, Q. C., he said in a voice which all the counsel and also the poor brow-beaten witness heard, " A damned obstinate witness."

But there is an authentic story of him while he was at the Bar. He had a well-disposed but interrupting junior with him in a case. No doubt such a junior, like the miner's wife in George Eliot's Felix Holt, of whom her husband said, " Lord a-massy ! she thinks she knows better nor me," is an annoyance, but his punishment at the hands of Henry Mathews was perhaps unnecessarily severe

" Sir," he said, when his argument was over, to his learned friend in the back row, " you have kept me in purgatory. What with you behind and that man in front " (that was the learned judge) " I have led the life of the damned. "

Once down on circuit he had as a junior a very careful man who is now a distinguished judge. They met in consultation and Henry Mathews said,

" There is only one point in this case..." and he expressed his view.

The junior with becoming diffidence suggested that there was another point. But his leader shook his head peremptorily and said, "No."

" Forgive me," said the client, who had just come into the room, " there is that point in the case."

" Is there? " said Mathews, and he took up the brief and flung it with its great white fluttering wings over the head of the client, and it fell rustling against the wall. " Well, find it, " said the irritated leader.

Perhaps it was that quality which deprived him of the success his ability should have had at the Home Office and led to his being called the " Not-at-home Secretary."

Thus of *Richard Webster*: Sir Richard Webster (Lord Alverstone) has given his own recollections to the world and made it superfluous my recollecting him. Still I cannot forget him, and my memories of him, are all respectful. He was a man of great assiduity and plausibility, but—may I be forgiven for saying it—not a great man, although he attained great eminence in his profession and sat in the seats of the mighty on the Bench. He worked like a nigger and larded like a cook. He made a point of addressing almost everyone, even casual friends, by their Christian names, but I have no doubt it was all done with the intention of being kind.

I was with him in many cases, although he had left the Parliamentary Bar before I went to it. We were together for the greater part of a winter before Lord Bramwell's Commission as to the silting-up of the Thames at Erith. I acted as his junior in several important arbitrations. I found a note from him not long ago which was written at the Courts and sent to me at Westminster, in which he said,

"Dear Balfour, keep it up. I am just finishing Belt & Laws."

"Yours,

"R. E. WEBSTER."

Well I daresay I did keep it up, but not like Westbury Chancery junior. Once Bethel had to leave a Chancery Court to go down to the House of Lords, and told his junior to keep it up. The great man when he got down to Westminster forgot all about the case in Lincoln's Inn Old Hall. Indeed he did not go back into that Court for three days, but when he did go back he found his faithful junior still "keeping it up."

Webster had a large practice before the Railway Commissioners and in most of the cases I was leader on the other side. He had a big head with a cupola of a forehead and flabby face-muscles (his leg muscles were not flabby, as his feats at Cambridge showed), which hung in dewlaps under his eyes. He had luck and used it to the best advantage. I think on the whole he had a flabby mind, but he was an excellent man and a good fellow.

I remember a case I had at Quarter Sessions at Taunton as to the rating of machinery in some bobbinet manufacturies at Chard. The question was whether certain machinery

which was not fixed to the freehold, but was in the factories for the purpose of making them what they were, and was intended to remain there so long as it was a bobbinet factory, were to be taken into account as enhancing the value of the hereditament for rating purposes.

We succeeded in the Court of Quarter Sessions, but the Magistrate stated a case for the opinion of a superior court. I do not remember what took place in the King's Bench or the Court of Appeal, but in the House of Lords my clients very properly took in Sir Richard Webster to lead me. I was unable to be present at consultation. But I heard that Webster said, "Where is Balfour Browne to support his rotten case" Not a thing like that remains in one's memory when more important matters runs through its limp fingers. The case came on in the Lords and again owing to my having a case before the Railway Commissioners I was not there the first thing; but when I could get away I got into a hansom and went down to Westminster.

As I arrived at the door which leads into St. Stephen's Hall, Webster was getting into a hansom.

"What happened?" I asked.

"We weren't called upon," he answered, and drove away, but not before, I had time to say,

"So much for my rotten case,"

And he drove away with that fly buzzing in his ear.

He was an indefatigable worker with a quick, bubbling intelligence. He was a genial man—too genial to all perhaps to impress any one with his real genuineness. He called more acquaintances by their Christian names, which discounted a similar courtesy in the case of old friends. But although he was hard-working, not very deep man, he was wonderfully successful with a profession--the solicitor's--which does not "throw the lead," and so find the "fathoms" of their counsel. Indeed, deep men at the Bar are not merely so successful as the ripples. We can see the latter, we cannot plumb the depths of the former. The time for the criticism of the others has not yet come. They are still "in for" the Examination of Life, and the "marks" are not yet determined.

These are his reminiscences of *Lord Davey*:

Horace Davey (Lord Davey) was a wizened little man whose eyes seemed only two of his wrinkles, he "peeped through his eyes" but he was a man with the quickness of a fencer and the penetration of a rapier. He had a superior sort of sniff. He was a man who found the door into the House of Commons the narrow gate. He was not destined to popularity, and even at an election meeting was called by some dissentient "a slimy toad." But he really was too good a man for a rough-and-tumble platform and proved it by his want of success at Dundee, Christchurch, and elsewhere. I only had Sir Horace Davey as my super-leader three times.

In another case I was with him under somewhat curious circumstances. The British Gas Light Company supplied gas in Hanley, and certain gas consumers in the town had applied to the Recorder to reduce the price of gas so supplied. The British Gas Light Company was somewhat peculiar in its constitution. It is a limited company that carried on gas undertakings in various places, and these undertakings are conducted under separate Acts of Parliament. There were therefore some complicated legal points in the case, and the Company had taken the written opinion of Sir Horace Davey before the hearing of the case before the Recorder of Hanley began, and acted upon that opinion in resisting the reduction in the price of gas. The Recorder, I think to suit the convenience of counsel, and for that I am grateful, sat to hear the case in London, and the matter was before him for nearly a fortnight. I acted for the Company and told him with all the emphasis of which I was capable—and I daresay some of my learned friends would have called my emphasis by a harsher name—that he could not under the circumstances make an order to reduce the price of gas. But he did order the Company to charge sixpence less for every thousand cubic feet of gas sold. I advised my clients to go for a writ of *certiorari* to quash the order and they asked me if I would take the brief in the High Court. The case was coming on in the Law Courts when all the Committees at Westminster were in what was called "full swing" and I explained that it would be impossible for me to argue the case in Court, and advised my clients, as they had consulted Sir Horace Davey, to give him the brief. This was done, and our clients gave me a brief too, although I told them I would not be there; but they asked me to attend the consultation with Sir

Horace, as I had been in the matter all through. I went up to his room in the Law Courts one morning early and we were admitted to consultation. Sir Horace blinked at us, and in a few minutes indicated that in his superior opinion we were all wrong and could not succeed. When he had fully committed himself to that view I said,

"I fear, Sir Horace, that you have forgotten that you advised this Company, and," I added, "we have been acting throughout upon your opinion."

He blinked again, but this time at our client. "Have you got my opinion ?" he asked.

The client said he had not the opinion with him, but he endorsed what he had asserted, that we had been acting all through the proceedings in accordance with his advice.

Sir Horace put his pooh-poohs in his pocket and said, "This case can't come on to-day. We will have another consultation to-morrow morning, and would you bring my opinion with you ?"

We met again the next morning and Sir Horace was exceedingly bland. He said to me,

"I am very sorry, Balfour Browne, that I have a case this morning in the Privy Council which I must attend to. Can you look after this until one o'clock ? I will be up by then."

I was not pleased, I explained to him that this was our busiest time at Westminster and that I had asked the clients to brief him because I could not be absent from the Lobbies.

Then with some apologetic matter he asked me as a favour to him to remain until one o'clock. "The case", he said, "won't be on till the afternoon, and I will relieve you at lunch-time."

I promised, perhaps not with a very good grace, to do that, and he went away to Downing Street and I went into Court. The case, contrary to his prophecy, came on very soon. It was all over before one o'clock; the decision was in our favour and the Recorder's order was set aside.

I was with him in another case. An exceedingly pleasant and able member of our Bar, Mr. Meysey-Thompson, who died young, was the junior, and was responsible for having advised the action. I do not remember whether he was right or wrong, but I remember the scathing contempt with which Sir Horace jumped on us. The consultation was nothing but a defence of Meysey-Thompson, but whether he was acquitted or not after that bad half-hour I am unable to say.

But that case, recalls, not pleasantly, a somewhat ungenerous trick of some of the super-leaders. It has been alleged of certain doctors that they have made a long face and a black prognosis in all the cases they are called into, with a view to a reputation for medical prescience if the worst comes to the worst, or a reputation for extraordinary skill if the patient by reason of his own constitution pulls through. I cannot think that it is the same clandestine policy which actuates the leaders referred to, but some have had the way of taking the gloomiest view of their client's case and of blighting with curt words the timid arguments of any Mr. Phunkey who may be their junior.

CONTEMPORARY LEGAL LITERATURE.

In the "*Harvard Law Review*" for January, Mr. Nathan Isaacs elaborates the view that the several schools of jurisprudence, philosophical, analytical, historical, comparative, sociological do not represent different avenues of approach to a common goal but rather common goals. Different schools will appeal differently to different countries at different stages of legal development. One school will appeal to a country with a Code, quite another to one that has yet to frame a code, and so forth. It is not merely a question of appealing ; even as a matter of suitability, one school is more suitable to one nation at a particular stage than another. The German jurisprudence, the forms and methods of which are largely due to the existence of the German Code, is wholly unsuitable to the American people. Jurisprudence has as much a continuing history according to the writer as law.

In the "*Law Quarterly Review*" (January) Professor Holdsworth discusses the early history of Banking. The *campsores* or money changers were the earliest bankers. The Italian money-changers gradually replaced the Jews as the financiers of Europe. The English kings were large borrowers from various Italian houses and Edward III by his refusal to repay the money which he had thus borrowed, ruined the Peruzzi and the Bardi of Florence. This development had taken place in Venice and other commercial cities of Italy by the first half of the fourteenth century. The money changers were first used only for transmission of money but soon money came to be deposited with them for safe custody from whom the merchant could draw at any time and the money changer could with the money lend at remunerative rates to others.

During the next half-century more than once provision was made for public oversight of the campsores and in the Acts, the term *bancherius* and *bancus*, became frequent, in what seems a technical sense. In time these banks came to realise that they could use not only the money actually deposited with them but also their credit. The banks became, to use modern terms, not only banks of deposit but also banks of issue. A direct result of this function was the growth of the political importance of the bank. The State soon found that its business was one of the undertakings which a bank would finance in return for privileges it could give. A State loan and a State bank in many different places and at many different times have been related as cause and effect. The idea of forming a fund to finance the State gave rise to the idea of forming a similar fund a *mons pietatis* to finance the poor and to deliver them from the clutches of the usurer. In Italy, in the sixteenth century, banks had come to play a very important part in the economic life of the State. But their importance made some measure of State control necessary both in the interests of the State and of its subjects. There was considerable legislation in Venice. At the end of the sixteenth century the most important banks in Europe were State or public banks. In England such a bank came to be established only after the Revolution. Till then, the goldsmiths used to do banking work. During the latter part of the seventeenth century, the growth of banking begins to be reflected in the reports by one or two cases which put a legal interpretation upon some parts of the machinery by which bankers did their business. These few cases and the statutes that established and regulated the Bank of England are the beginning of the English law of Banking. The reports show indications that the business will eventually add a new-species to each of the two classes of Negotiable Instruments known to mercantile law, the cheque and bank-note.

Mr. Frederick Edward Farrer completes his learned article on that species of bastard known as Bastard Eigne. The subject itself is not of interest to us in India but a passage from Coke is extracted which is as follows:—"If a man hath a wife and dyeth and within a very short time after the wife marrieth again and within nine months hath a child so as it may be the child of one or the other some have said, that in this case the childe may choose this father *quia in hoc casu filiatio non potest probari* and so is the booke to be intended."

" In another article, the first of a series, Mr. T. Bennett gives a general exposition of the legal principles which govern the position of Free Churches within the State. The term Free Church is often for convenience applied to denote only Evangelical Free Churches. In the division made by the law of the land, the term Free Church includes the Jewish, Roman Catholic and Unitarian Churches, in other words the term is used in the sense of *Non-Established Church.* No society of men can be wholly exempt from State control and Free Churches form no exception to this rule, but they differ from the *Established* Church in this that they are entirely free from State control as regards doctrine, government and discipline and it is this *freedom* which differentiates them from Established Churches. Before the Toleration Act of 1689 every form of worship except the particular form enforced by *Parliament* was forbidden by the law of the land. Down to the middle of the 19th century some taint of the old penal laws still cling round a certain number of Free Church places of worship which had been erected while persecuting statutes were still in force and it is only by the Non-Conformists' Chapels Act, 1844 were the effects of penal laws entirely swept away. In the present state of the law the question of lawfulness of Free Church rules and trust can hardly arise as a practical issue, though the possibility is not excluded. With the limitation that it may not break the law of the land a voluntary association (which a Free Church is) on its formation may make whatever rule it pleases with regard to its own special objects. The extent to which the Courts can be called upon to consider the rules of those associations is considered in, among others *Long* v. *Bishop of Cape Town* [1], and *Forbes* v. *Eden* [2]. "Save for the due disposal and administration of property there is no authority in Courts either of England or Scotland to take cognisance of the rules of a voluntary society entered into merely for the regulation of its own affairs. If funds are settled to be disposed of among members of a voluntary association according to their rules and regulations, the Court must necessarily take cognisance of those regulations for the purpose of satisfying itself as to who is entitled to the funds, &c. There is no jurisdiction in the Court of Session to reduce *i. e.* to annul the rules of a voluntary society indeed to inquire into them at all, except so far as may be necessary for some collateral purpose.""

1. 1 Moore P. C. N. S. 411.

2. L. R. 1 Sc. and D. 568.

If the rules set up a tribunal for inquiry into breach of regulations of the association, its conclusions will be enforced provided the procedure adopted is consistent with natural justice.

Mr. George J. Phillips argues that by the repudiation by Germany of its obligations under the declaration of Paris, 1856, the other Treaty powers are equally released from the obligations not only towards Germany but also towards the other neutrals who are parties to the Treaty. His contention is that treaties of this kind are not a number of separate agreements but one agreement between several parties and repudiation by one puts an end to the contract altogether.

An account of what is called *Ransom Bills* is given by Mr. W. Senior. Up to the end of the eighteenth century, it was permitted according to the usage of nations to captors of Enemy-ships to let go the ship on an undertaking by the Captain to pay a certain sum of money and action was held maintainable directly by the alien enemy in whose favour there was the bill, but in 1782 the practice was made illegal, though an exception is recognised in the case of Commandants of King's ships. Even now the practice is permitted to the Commandant of a King's ship provided it is not opposed to any Ordinances in Council.

BOOK REVIEW.

THE CENTURY REGISTRATION AND STAMP LAW, *by Mulchandra Ganguli Cranenberg Law Publishing House, Calcutta.*

This is a book of ready reference on the Stamp and Registration Laws. Practitioners find not a little difficulty when having to deal with the admissibility of documents in evidence under the old repealed Stamp and Registration Laws. The book under review is intended to satisfy the want in this direction of a book which gives all the repealed enactments on the questions of Stamp and Registration. It also gives a good deal of useful information such as chronological tables for over 100 years and a list of Civil Court holidays in Bengal, Behar, Orissa and Assam.

[*End of Volume XXXIV.*]